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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. BARRY LAMAR BONDS, Defendant.	Case No. CR 07 0732 SI **DEFENDANT'S REPLY IN SUPPORT OF MOTION TO CONFORM GOVERNMENT'S EVIDENCE TO THIS COURT'S FEBRUARY 19, 2009 ORDER** Date: January 21, 2011 Time: 11 a.m. Judge: The Honorable Susan Illston

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INTRODUCTION

At the inception of this prosecution, the government indicated that it intended to introduce a mass of evidence — logs from Balco, test results from different laboratories of multiple urine and blood samples, and notations in the handwriting of Greg Anderson, some on calendars — as proof that defendant Barry Bonds lied to the grand jury in December of 2003 when he denied knowingly taking steroids and other performance enhancing drugs. On February 19, 2009, this Court excluded that evidence from admission on the grounds that the government could not prove by competent evidence the fact crucial to establishing its relevancy, i.e., that the test results, blood and urine samples, and notations concerned Mr. Bonds. Because the test results, samples, and notations concerned a party whose identity was unproven, that evidence as a matter of law could not be probative of Mr. Bonds's use of performance enhancing substances. That ruling was affirmed on appeal. *United States v. Bonds*, 608 F.3d 495, 500 (9th Cir. 2010)

The defense has moved the Court to confirm its earlier ruling by again barring admission of the test results, blood and urine specimens, and Anderson notations, as well as all other evidence rendered irrelevant by the effect of the February, 2009 order.[1] In opposing that motion, the government seeks to gain admission of virtually all of the evidence that the Court previously excluded. The government's Opposition [hereafter "Opp."] contends that the excluded evidence, while inadmissible to prove Mr. Bonds's use of illegal substances, is relevant, and more probative then prejudicial, on the issue of whether the allegedly false statements made by Bonds were material to the investigation the grand jury was conducting.

Anticipating this tactic in its ruling in February of 2009, the Court cautioned that

> the government cannot use the broad definition of materiality in [*United States v. Gaudin*, 515 U.S. 506 (1995)] to bootstrap otherwise inadmissible evidence into this case. Should the government seek to admit the evidence excluded in this order to prove materiality, the Court will expect some showing that the particular aspect of materiality cannot be easily proven through another means.

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[1] The government's waiver argument under Fed.R.Crim.P. 12(e) (Opp. at 5) is frivolous. Defendant's "Motion to Conform" is being briefed on a schedule agreed upon by the parties and set by the court.

February 19, 2009 order (Dkt. 137) at 20-21.

The government claims that it "understands and respects the Court's ruling" (Opp. at 8), but the positions it takes mock the Court's directive.

First, rather than respecting the Court's ruling that the government has not established that any of the excluded evidence concerns Mr. Bonds, the government repeatedly asserts in the "Facts" section of its Opposition the precise contrary. *See, e.g.*, Opp. at 3 ("ledger and the drug test results found at Balco ... indicated that Bond's urine tested positive for anabolic steroids on three separate occasions in 2000 and 2001"); *id*. at 4 ("[T]he documents from Anderson's residence provide a detailed record of steroid distribution from Anderson to Bonds from 2001 to 2003, with entries referring to injectable steroids, human growth hormone, and other drugs."); *see also id*., at 7 (government claims it possesses "voluminous documents reflecting the role of the Balco defendants in distributing drugs to Bonds and monitoring his use of those drugs."). If the name "Bonds" were removed from these assertions, as the Court's prior order effectively requires, the government's argument for admission of the excluded evidence on materiality grounds collapses.

Second, the government's claim that the excluded evidence is relevant to the issue of materiality because it provides "context," "background," and the reasons for calling Mr. Bonds before the grand jury is specious. The law clearly defines materiality in objective terms. It defines the issue as whether there is a logical connection between the object of a grand jury investigation and the answer to a question put to a grand jury witness. *See* Opp. at 6, quoting *United States v. McKenna*, 327 F.3d 830, 838 (9th Cir. 2003) ("'[A] statement is material if it has a natural tendency to influence, or was capable of influencing, the decision of the decision-making body to which it was addressed.'"). As discussed more fully below, materiality has nothing to do with the subjective state of mind of prosecutors or investigators — *e.g.*, what they have heard or think or their motivations in calling a witness before a grand jury — particularly when that state of mind has been shaped by inadmissible hearsay and speculation.

Third and finally, the government simply fails to come to grips with the Court's command that to gain admission of any evidence previously excluded, the government must

show "that the particular aspect of materiality cannot be easily proven through another means." As the government acknowledges (Opp. at 8), it will be able to introduce at trial portions of the grand jury transcript, and it can introduce the Balco indictment of Anderson, Conte, and Valente as well. That evidence will establish that the grand jury was investigating Anderson's distribution of performance enhancing drugs, and that Mr. Bonds's answers to questions as to whether Anderson gave him such substances had "a natural tendency to influence, or was capable of influencing, the decision of the decision-making body to which it was addressed" — the grand jury.

In sum, the government's claim that it needs the excluded evidence to establish the materiality of the allegedly false statements is disingenuous. Its objective in seeking admission of the evidence lies elsewhere. Assertions in the Opposition make plain that, were the excluded evidence to be admitted, the government would rely on it as proof of the falsity of Mr. Bonds's denials of knowing drug use, the very purpose this Court's prior exclusionary order proscribed. The Court's order of February 19, 2009 should be reaffirmed and enforced.

ARGUMENT

I. THE EVIDENCE EXCLUDED BY THE COURT'S PRIOR ORDER IS NEITHER RELEVANT TO, NOR MORE PROBATIVE THAN PREJUDICIAL ON, THE ISSUE OF THE MATERIALITY OF DEFENDANT'S ALLEGEDLY FALSE STATEMENTS

Mr. Bonds begins with three broad responses to the government's legal positions before turning to the specific categories of evidence the government seeks to admit, as discussed at pages 9 to 25 of its Opposition.

A. The Excluded Evidence Is Not Relevant To the Issue of Materiality

The Opposition asserts that: "The defense does not seriously contest the relevance of the [excluded evidence] to materiality...." Opp. at 9. To paraphrase Winston Churchill, rarely has the exact opposite of the truth been stated with greater precision. Defendant Bonds most assuredly contends that the excluded evidence is irrelevant to the issue of the materiality of the charged questions and answers.

If a question put to a grand jury witness logically relates to the object of that grand jury

investigation, the answer to that question is material because the answer "has a natural tendency to influence, or was capable of influencing, the decision of the decision-making body to which it was addressed." *McKenna*, 327 F.3d at 838. In this case, the issue of materiality is simply whether the charged questions and answers were reasonably related to the object of the Balco investigation, which was "the illegal drug-trafficking conduct of Victor Conte, Greg Anderson, and others associated with Balco." Opp. at 6.

As noted in Mr. Bonds's motion to conform, the second superseding indictment charges Mr. Bonds with making ten specific false statements to the grand jury.[2] The indictment alleges that Mr. Bonds gave nine false answers to questions asking whether Mr. Anderson (or "Greg") gave the defendant a performance enhancing substance, and one false answer to the question of whether Mr. Anderson ever injected Mr. Bonds. The grand jury transcript establishes that Mr. Bonds was informed that the grand jury was investigating whether Greg Anderson, Bond's trainer, and Victor Conte distributed illegal substances to athletes. *See* Grand Jury Transcript at 3-4. At trial the government can introduce the Anderson and Conte indictment, which contains the allegation that: "[D]efendant Greg Anderson ... was a personal trainer in the Burlingame area who purchased performance-enhancing drugs from BALCO and distributed them to professional athletes...." *See* Exhibit A to this motion, the Balco indictment, at par. 5. Given this evidence of the grand jury's focus, the materiality of the charged questions and answers will be obvious to the jury.

The evidence which this Court found inadmissible to prove that Mr. Bonds received and used performance enhancing drugs from Anderson cannot make it "more or less probable" that Mr. Bonds's answers were material. Fed. R. Evid. 401. A piece of evidence — be it a document, urine sample, or test result — that, as a matter of law, does not concern Mr. Bonds cannot render the ten charged questions and answers more logically related to the object of the Balco

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[2] At page 6, footnote 1 of the Opposition, the government contends that Mr. Bonds also is charged with "the series of evasive and misleading statements identified in the government's October 15, 2010 jury instructions." On January 7, 2011, Mr. Bonds filed a motion challenging the injection of those statements into the charges against him.

investigation than "it would be without the evidence." *Id*.

Nor does a document become relevant to the issue of materiality because it provided a reason to call Mr. Bonds before the grand jury or ask him a particular question. *See* Opp. at 8 ("The provisionally excluded documents represent the best proof of materiality, as they provided the impetus for putting Bonds before the grand jury in the first place.") The reasons why a witness is called or asked a question implicate the subjective mental state of prosecutors and/or investigators, not the objective logical relationship of a witness's answer to the focus of a grand jury investigation. Mr. Bonds may have been called before the Balco grand jury for reasons clearly related to the pending investigation, but that motivation would not render material a question about whether he would sign a new contract or pursue free agency. Conversely, prosecutors might have been impelled to call Mr. Bonds largely in the hopes of obtaining his autograph, but that self-indulgent motivation would not render immaterial questions and answers such as those specifically charged in defendant's indictment.

Nor does the fact that the government has the burden of proof on a subjective element of materiality — it must "prove that the defendant knew that his false statements were material to the grand jury" (Opp. at 7) — render the excluded evidence admissible. That subjective element concerns Mr. Bonds's mental state, has nothing to do with the mental state of prosecutors and investigators, and cannot possibly serve as a basis for the admission of the otherwise inadmissible hearsay and speculation to which those officials may have been exposed.

As noted above, the grand jury transcript itself establishes that Mr. Bonds was informed that the grand jury was investigating whether Greg Anderson, Bond's trainer, and Victor Conte distributed illegal substances to athletes. Mr. Bonds testified that he received the clear and the cream from Anderson, and acknowledged that he now suspected that the clear and the cream might consist of performance enhancing drugs. Putting before the trial jury documents shown to Mr. Bonds for the first time when he appeared before the grand jury adds nothing relevant on the issue of materiality, particularly given that the government is barred from arguing, and the trial jury is barred from concluding, that the documents concern Mr. Bonds or that they contain any

truthful information whatsoever.

B. Under Rule 403, The Excluded Evidence Cannot Be Admitted On The Theory That It Provides "Context" Or "Background," Or That It Bears On The Mental State of Prosecutors or Investigators

The government claims that it is entitled to introduce the excluded evidence to put Mr. Bonds's allegedly false statements in their "necessary context" rather than "present[ing] them in a vacuum." (Opp. at 7). The contention is quite similar to ones frequently considered by the federal circuits. Prosecutors have called an officer and asked him to explain why he investigated or arrested the defendant. The officer then relayed to the jury what otherwise would be inadmissible evidence — typically un-tested and un-crossed hearsay or prejudicial character evidence — for the ostensible non-hearsay purpose of explaining the "background" and "context" of the investigation, thereby skirting the force of exclusionary rules such as Rule 404 and Rule 802, as well as the Confrontation Clause itself.

Courts and commentators alike have resoundingly rejected such tactics. Mueller and Kirkpatrick, for example, counsel that the use of "investigative background" evidence to "escape the bar of the hearsay doctrine" must be rejected. *See* 4 Mueller & Kirkpatrick, *Federal Evidence* § 8.50 (3d ed. 2007). The reason is simple: "such proof can pollute trials in just the way that other doctrines seek to prevent." *Id.*; *see also McCormick on Evidence* § 249 (6th ed. 2006) ("The need for [investigative background] evidence is slight, the likelihood of misuse great."); 3 Michael H. Graham, *Handbook of Federal Evidence* § 801:5 (6th ed. 2006) (stating that "absent special circumstances enhancing probative value" such evidence should "be excluded on the grounds that the probative value of the statement admitted for a non-hearsay purpose is substantially outweighed by the danger of unfair prejudice").

Circuit courts have reached the same conclusion. In *United States v. Evans*, 216 F.3d 80 (D.C. Cir. 2000) (Garland, J.), for example, the officer called an undercover narcotics officer and asked him to explain how and why he came to focus on the defendant. The officer then relayed "information" he had received from informants about the defendant. On appeal, the government argued (just as the government argues here) that the testimony was relevant nonhearsay because

it was offered "as 'background' – merely for the value of giving the jury a complete picture of the events in question." *Id*. at 87. The D.C. Circuit rejected that argument.

> Approving the admission of [the officer's] testimony under these circumstances would open a large loophole in the hearsay rule. If we were to accept the government's rationale here, then explaining why government agents "did what they did" through reference to statements of absent informants would be acceptable in almost any case involving an undercover operation, and in many others as well. That is a loophole this circuit has previously refused to open. *Id*. at 86.

Other circuits have reached the same conclusion in similar circumstances. *See, e.g.*, *United States v. Benitez-Avila*, 570 F.3d 364, 369 (1st Cir. 2009); *United States v. Baker*, 432 F.3d 1189, 1206, 1219 (11th Cir. 2005); *Ryan v. Miller*, 303 F.3d 231, 252-53 (2d Cir. 2002); *United States v. Williams*, 133 F.3d 1048, 1051-52 (7th Cir. 1998); *United States v. Fountain*, 2 F.3d 656, 668-69 (6th Cir. 1993).[3] Remarkably, the government cites *Ryan v. Miller* (Opp. at 19), although the holding of that case is a dagger to the heart of the prosecution's position. 303 F.3d at 253 ("Because the testimony is only relevant to the very purpose for which the jury cannot consider it, it is not admissible testimony under the background exception")

Here, the government responds to this line of authority primarily by noting that its evidence is relevant to show "context or background," and thus that it is not offered for a hearsay purpose. Opp. at 18-19. Once again, Judge Garland's opinion in *Evans* – responding to the very same point – is instructive. While it may be true that background or context evidence "is technically not hearsay at all," it remains true that such evidence is inadmissible under Rule 403.

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[3] The Ninth Circuit cases cited by the government (Opp. at 18-19) are not to the contrary. *United States v. Gibson*, 690 F.2d 697 (9th Cir. 1982), dealt with statements made by employees of a fraudulent business to potential investors. The Ninth Circuit held, uncontroversially, that such statements were not hearsay, and that even if they were, they were admissible under various hearsay exceptions. *Gibson* has no applicability here.

United States v. Echeverry, 759 F.2d 1451 (9th Cir. 1985), dealt with statements by an informant to an investigator. The court held (in summary fashion) that such statements were not hearsay because they were offered for "necessary background information," and in any event, that any error in admitting the statements was harmless because the disputed statements "did not directly implicate" the defendant. *Id*. at 1457.

216 F.3d at 87.

Here, because the excluded evidence has no tendency in reason to prove the charged statements more material than do the questions and answers themselves, it cannot survive a bare Rule 401 challenge. A fortiori, it cannot survive a Rule 403 challenge – because the potential for unfair prejudice is vast. "Regardless of the reason for which the court and the prosecutor thought the evidence was being offered, the prejudice inquiry asks whether 'the jury [was] likely to consider the statement for the truth of what was stated with significant resultant prejudice.'" *Evans*, 216 F.3d at 87 (quoting *United States v. Reyes*, 18 F.3d 65, 70 (2d Cir. 1994)); *see also Baker*, 432 F.3d at 1219 n.36 (stating that even though evidence describing the background of the case is "inextricably intertwined" with other evidence, "it must still satisfy Rule 403").

In this case, there is an overwhelming likelihood that the jury would consider the disputed evidence for an impermissible purpose; indeed, as discussed below, the government has made clear that it intends that precise result. It is not realistic to expect the jury to confine itself to the fairly marginal and uninteresting questions of "background" and "context" when the impermissible inferences are so powerfully alluring.[4]

C. If the Excluded Evidence Is Admitted on the Issue of Materiality, the Government Will Violate this Court's Order by Relying on That Evidence as Proof of the Defendant's Receipt and Use of Performance Enhancing Drugs

The government is struggling mightily to admit the excluded evidence ostensibly on the issue of materiality when it has no need of additional evidence on that element of the charged offenses. The reasons for its Herculean labor are transparent: it intends to use the evidence for the purpose proscribed by the Court's February, 2009 order.

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[4] Nor in this context is it appropriate to rely on boilerplate arguments that jurors are presumed to follow limiting instructions. *See* Opp. at 24-25. As Judge Leval put it in *Reyes*: "Ordinarily we assume that juries will follow limiting and curative instructions. There are, however, occasions where the prejudice is so severe that such instructions are unlikely to be effective. Given the high potency of these declarations, their determinative significance for the only important issue in the trial, and their lack of significance for any other purpose, the limiting instructions given by the court were unlikely to prevent the jury from considering the declarations for their truth." 18 F.3d at 71-72.

The Court ruled that the government could not lay the necessary foundation for admission of the excluded evidence: viz., that the test results, urine and blood specimens, and various calendars and documentation in fact concerned Mr. Bonds. That being so, the government is barred from asking the jury to draw that proscribed inference. Yet the government's materiality arguments explicitly rely on just that forbidden premise.

For example, under the rubric of establishing materiality, the government begins by assuming the fact that the Court has ruled it has failed to prove: that the seized documents concerned Mr. Bonds. Opp. at 10 ("The seizure of the test documents from the Balco premises and Anderson's residence linked Bonds to Balco and Anderson, and plainly implicated Bonds as someone with knowledge of the drug trafficking activities of Conte, Anderson and the other Balco defendants.") The government then contends that it should be permitted to present the excluded documentation to the jury so that it can argue that "Bond's false denials of knowing steroid receipt and use of the drugs provided by the Balco defendants cast doubt on the credibility of the calendars and other documents tending to demonstrate the distribution of steroids;" thus, "the calendars and other documents" are material. Opp. at 11. But a jury could not conclude that Bonds's denials cast any doubt whatsoever on the credibility of the seized calendars and other documentation unless it first concluded that those documents concerned Bonds's own "knowing steroid receipt and use of the drugs provided by the Balco defendants." That is precisely the inference that this Court has prohibited the government from urging upon the jury.

Likewise, unless the evidence in question remains excluded, the government will also violate the Court's prior order by arguing to the jury that "the documents from Anderson's residence provide a detailed record of steroid distribution from Anderson to Bonds from 2001 to 2003, with entries referring to injectable steroids, human growth hormone, and other drugs" (Opp. at 4), and that the "voluminous documents reflect[] the role of the Balco defendants in distributing drugs to Bonds and monitoring his use of those drugs." (Opp. at 7).

The Court's order compels the government to prove that Mr. Bonds's denials of receiving and using drugs from Anderson were false by means of evidence other than that covered by the

February, 2009 order. If the government succeeds in that task, the jury will have no difficulty finding the charged statements material to the Balco investigation. The government's effort to gain admission of the excluded in order to use it for an improper purpose must be rejected.

D. The Government's Proffered Evidence

The government has grouped the excluded evidence it now seeks to admit in eight categories. The defense reply to each category of evidence, with some exceptions, largely rests on one or more of the general objections discussed above.

1. Test Result Documents

The government's argument on this critical category of excluded evidence clearly exposes its intention to violate this Court's prior exclusionary order. Having asserted that the test results constitute proof that "Bonds was a knowing recipient of steroids who was knowingly having his blood and urine tested as part of his regimen of steroid use and receipt," the government insists it should be "permitted to offer the above-referenced test result documents not for the truth of the information asserted within them, but to prove the ways in which Bonds's testimony could have materially affected the grand jury, *particularly as that testimony contradicted the test results*. Opp. at 11 (italics added). But there can be no such contradiction unless the jury were to impermissibly find, at the government's urging, that the test results concern Mr. Bonds and that they prove what the government claims is "the truth of the information asserted within them."

The flaws in the government's argument are conspicuously evident in its focus on four exhibits, attached to its Opposition papers, that this Court excluded from evidence, but which the Opposition describes as "important to the government's proof of materiality in this case." Opp. at 9. They are Balco log sheets referencing Mr. Bonds's name (Exhibit 1), Quest Diagnostic test results (Exhibit 2), handwritten notes captioned "Barry" (Exhibit 3), and calendars containing the initials "BB" and "BLB." (Exhibit 4). Without explication, the government urges that this Court's February 19th order may be respected by redacting the excluded documents "to remove references to actual positive test results, in order to address the defense concern of the trial jury

considering the inadmissible hearsay contained within the documents." Opp. at 8.[5]

Contrary to the government's assertion, positive test results are not the only inadmissible hearsay contained in the documents. Rather, as this Court expressly and repeatedly found, the documents were excluded because the government failed to establish by competent admissible evidence the factual predicate that the documents actually referred to Mr. Bonds. These documents cannot possibly be relevant to materiality unless the alleged references to Mr. Bonds are proven to be true. Absent competent admissible evidence at trial to authenticate those references, the exhibits constitute rank hearsay and are not admissible to show materiality or anything else.

The admissibility issue might be left at that, but the defense will address the government's arguments for admissibility of the forty-nine exhibits that have been excluded or should be excluded pursuant to the February 19th order.[6]

- Exhibit Two – "2 Balco Letters (5/30/03; 6/6/03) (4 p.)"

This Exhibit apparently consists of two transmittal letters of urine samples that the government would attribute to Mr. Bonds, a proposition that it cannot prove with competent, admissible evidence at trial. The letters are allegedly linked to Mr. Bonds by the Balco logs in Exhibit One that the Court ordered excluded. Absent competent foundational evidence, the letters are irrelevant.

- Exhibit Three – "BLB Quest Documents (10 reports; 38 p.)"

This Exhibit apparently consists of 10 urine test results for urine samples that the government would attribute to Mr. Bonds, a proposition that it cannot prove with competent,

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[5]Actually, the copies of the government's exhibits available from the Court website include no redactions, leaving the Court and counsel to guess precisely what deletions the government intends to make. No matter, as discussed above, deleting references to positive tests will not address the hearsay issues presented by these exhibits.

[6] We identify the government's exhibits with the precise language used in the government's Exhibit List, in part for the sake of clarity and in part to demonstrate that the government's labeling frequently and prejudicially assumes facts that are not in evidence and that cannot be proved by competent evidence.

admissible evidence at trial.

• Exhibit Six – "Specialty Lab & Fedex Documents (2 p.) (1/19/01)"

This Exhibit apparently consists of one page of a Federal Express address sheet and one page of a Specialty Laboratory transmittal sheet for a blood sample that the government would attribute to Mr. Bonds, a proposition that it cannot prove with competent, admissible evidence at trial.

• Exhibit Seven – "B, B Specialty Lab Results (20 p.)"

This Exhibit apparently consists of test results for a blood sample that the government would attribute to Mr. Bonds, a proposition that it cannot prove with competent, admissible evidence at trial.

• Exhibit Eight – "Balco Blood Test Log Books, 2001-2003 (8 pgs.)"

This Exhibit apparently consists of a Balco computerized log that the government contends refers to Mr. Bonds and others, apparently relating to blood test samples, a proposition that it cannot prove with competent, admissible evidence at trial.

• Exhibit Nine – "Balco BLB Blood Tests (1/19/01; 4/12/01; 2/5/03;) (13 p.)"

This Exhibit apparently consists of three test results for blood samples that the government would attribute to Mr. Bonds, a proposition that it cannot prove with competent, admissible evidence at trial

• Exhibit Ten – "LabOne Blood Test Fedex Documents (4 p.) (1/8/02; 4/12/02)

This Exhibit apparently consists of Federal Express transmittal documents for two blood samples that the government would attribute to Mr. Bonds, a proposition that it cannot prove with competent, admissible evidence at trial.

• Exhibit Thirteen – "LabOne Tests (1) & BLB Calendars (11) (12 p.)"

This Exhibit apparently includes one test result[7] for a blood sample that the government would attribute to Mr. Bonds, a proposition that it cannot prove with competent, admissible

[7] Exhibits Thirteen and Thirty-Three include both test results and calendars. The government evaluated those two items of evidence separately. We will follow suit.

evidence at trial.

- Exhibit Thirty-Three – Calendars, BLB Tests, Quest, & LabOne in folder labeled "B" (37 p. & Folder)"

This Exhibit apparently includes five test results for blood samples (and three pages of correspondence pertaining to one of those blood samples) that the government would attribute to Mr. Bonds, a proposition that it cannot prove with competent, admissible evidence at trial.

The Exhibit also apparently includes two test results for urine samples that the government would attribute to Mr. Bonds, a proposition that it cannot prove with competent, admissible evidence at trial.[8]

- Exhibit Thirty-Eight – "Greg Anderson 25" File - LabOne & Quest Documents w/ BLB DOB (4 p. & Folder)

This Exhibit apparently includes three test results for blood samples that the government would attribute to Mr. Bonds, a proposition that it cannot prove with competent, admissible evidence at trial. The Exhibit also apparently includes one test result for a urine sample that the government would attribute to Mr. Bonds, a proposition that it cannot prove with competent, admissible evidence at trial.

- Exhibits Forty-Five Through Fifty-Four – "Quest Documents"

Each of these ten Exhibits apparently consists of test results and related documentation for urine samples that the government would attribute to Mr. Bonds, a proposition that it cannot prove with competent, admissible evidence at trial.

- Exhibit Fifty-Nine – "LabOne Blood Tests Barry Bonds (44 p.)"

This Exhibit apparently consists of four test results for blood samples that the government would attribute to Mr. Bonds, a proposition that it cannot prove with competent, admissible evidence at trial.

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[8] In addition to test results and calendars, Exhibit Thirty-Three also includes one page of handwritten notes that do not purport to refer to Mr. Bonds and eight pages that appear to prescribe a workout regimen for an unidentified person. The government did not address these items in its papers. Absent a foundational witness for the proposition that these items pertain to Mr. Bonds, they are irrelevant.

• Exhibit Sixty – "Specialty Lab Tests"

This Exhibit apparently consists of at least one test result and related documentation for one or more blood samples that the government would attribute to Mr. Bonds, a proposition that it cannot prove with competent, admissible evidence at trial.

2. The Calendars

The government seeks to admit portions of Exhibits Thirty-Three and Thirty-Eight, consisting of calendars with handwritten notations that purportedly refer to Mr. Bonds's use of steroids and other performance enhancing drugs, to demonstrate the materiality of his grand jury testimony. Opp. at 11. As with the test result documents, the government acknowledges its view that the calendars "suggested Bonds's knowing receipt of anabolic steroids . . ." Opp. at 12. Nevertheless, disclaiming that purpose in seeking their admission into evidence, the government advances three supposedly non-hearsay theories of admissibility to demonstrate the materiality of his grand jury testimony together with a fourth theory that is seemingly divorced from the issue of materiality and virtually any other theory of admissibility.

First, as with the test result documents, the government argues that the calendars were substantive evidence of Anderson's steroid trafficking that Mr. Bonds could either corroborate or cast doubt upon, thereby showing the materiality of his testimony as reflected in Counts One, Two and Three. Opp. at 12. Second, because the calendars allegedly indicate that Mr. Bonds received injections and/or human growth hormone, his testimony that he was not injected by Anderson and did not receive human growth hormone was similarly material to his testimony in Counts Four and Five because that testimony also cast doubt upon the accuracy of the calendars. *Id*. at 12-13. Third, because the calendars allegedly indicate that Mr. Bonds received steroids during specific periods of time, his testimony concerning the timing of his receipt of the clear and cream from Anderson, as reflected in Counts Six through Ten, also cast doubt upon the calendars' accuracy. And finally, in a point unrelated to Mr. Bonds's grand jury testimony, the government argues that the calendars are admissible essentially "to demonstrate the materiality of Bonds's false, evasive, and misleading statements with respsect [sic] to the calendars." Opp. at

13.

Given the preceding discussion of the test result documents, the government's first three arguments are readily dispatched. Each assumes precisely the central fact that the government cannot prove — i.e., that the calendars do indeed refer to Mr. Bonds and illustrate his use of anabolic steroids and human growth hormone. Unless the calendars are authenticated by competent evidence, they are no more probative to the materiality of Mr. Bonds's testimony than calendars for other athletes or for an unknown person. And unless the government establishes at trial that the calendars refer to Mr. Bonds and his drug use, then his testimony cannot logically be said to have corroborated or cast doubt upon them. Thus, the government's theories of admissibility of the calendars for materiality stand or fall on the truth of the matters asserted and are not proffered for a non-hearsay purpose.

Finally, the government's attempt to justify the admissibility of the calendars "to demonstrate the materiality of Bonds's false, evasive, and misleading statements with respsect [sic] to the calendars" is confusing and unpersuasive. Opp. at 13. What false statement concerning the calendars did Mr. Bonds make? The indictment charges none. The government claims that Stan Conte will testify that "Bonds told Conte that Anderson put Bonds's initials on calendars to protect other athletes." *Id*. But at no point in his lengthy testimony was Mr. Bonds asked whether he knew that Anderson kept calendars, whether Anderson told him that he kept calendars, or whether Mr. Bonds told Stan Conte that Anderson put Mr. Bonds's initials on calendars. Thus, Stan Conte's anticipated testimony is not relevant or admissible to show a purpose of evasion by Mr. Bonds, and his testimony cannot be used to bootstrap the admission of calendars that are hearsay and otherwise inadmissible.

3. Ledger Sheets, Handwritten Notes and Other Items

This category of evidence proffered by the government consists of the following:

- Exhibit One – Balco Log Sheets (26 pages)

This Exhibit apparently consists of 26 pages of internal Balco documents, primarily handwritten notes and ledgers. The Court's February 19th order excluded them.

• Exhibit Eleven – BLB Nutritional Program (2 p.)

This Exhibit apparently consists of a nutritional program supposedly developed by Victor Conte for Mr. Bonds.

• Exhibit Fourteen – Brown Portfolio

This Exhibit apparently consists of an unidentified portfolio.

• Exhibit Twenty-Eight – "Envelopes located with cash (13 p.)"

This Exhibit apparently consists of envelopes and documents with handwritten notations including references to money or cash, allegedly seized from Greg Anderson's residence.

• Exhibit Twenty-Nine – Handwritten Note

This Exhibit appears to consist of one page of handwritten notes that the government contends refers to Mr. Bonds and apparently others. The Court's February 19th order excluded them.

• Exhibit Thirty-Two – BLB Handwritten Note

This Exhibit appears to consist of one page of handwritten notes that the government contends refers to Mr. Bonds. The Court excluded this Exhibit in its February 19th order.

The government argues that this category of evidence is material because "[t]hese documents demonstrate that Bonds had a relationship with Balco and Anderson in which Bonds received drugs from Balco and Anderson, and was tested in connection with his use of them." Opp. at 14. Because the government is barred by the court's prior order from urging the jury to draw these inferences from the documentation, its materiality argument fails on that ground alone. This category of evidence is obviously barred by Rule 403 as well.

4. Photo Log Sheets

The government has proffered the following exhibits in this category:

• Exhibit Sixty-Two – Photo Log Sheets - Balco

This Exhibit appears to be a photograph of documents seized at Balco, including the handwritten logs included in Exhibit One and various urine test results from Quest Diagnostics. The Court excluded Exhibit One and the Quest Diagnostic urine test results in its February 19th

order.

- Exhibit Sixty-Four – "Photo Athlete Folders From Closet- Anderson Residence"

This Exhibit appears to be a photograph of documents and other items seized from Greg Anderson's residence. The government apparently will contend that the folders in the picture refer to specific clients, possibly including Mr. Bonds.

- Exhibit Sixty-Five – "Photos-drawer w/Barry notes & drugs-Anderson Residence"

This Exhibit appears to be a photograph of Exhibits Twenty-Nine and Thirty-One.

- Exhibit Sixty-Seven – "Photo - Safe w/ $ & note-Anderson Residence"

This Exhibit appears to be photograph of items included in Exhibit Twenty-Eight.

- Exhibit Seventy – "Photo - Brown Portfolio-Anderson Vehicle"

This Exhibit appears to be a photograph of a portfolio, seized from Greg Anderson's car, that allegedly contained client files.

The government contends that it is entitled to gain admission not only of the previously excluded documentation seized in searches of the Balco premises and Anderson's residence, but also of photos taken of that documentation. Opp. at 15. Because the documents are inadmissible, the photos are doubly so.

Furthermore, the government claims the right "to summarize the results of the searches and the relationship between those searches and the decision to have Bonds testify." (Opp., at 15). This gambit, a clear assault on the ban on hearsay and speculation, is forbidden by the case law cited above. The hearsay ban must apply all the more forcefully in a case where the claimed need for added proof of materiality is groundless.

5. The Envelope with Cash

Exhibit Twenty-Eight – "Envelopes located with cash(13 p.)"

This Exhibit apparently consists of envelopes and documents with handwritten notations including references to money or cash, allegedly seized from Greg Anderson's residence. This Exhibit was a subject of the Court's Order of exclusion. *See* February 19th order at 14.

The government's argument for admissibility of this category of evidence is particularly

confused. Initially, the government argues that the $63,000 in cash is "probative evidence tending to establish that Anderson was hoarding cash proceeds garnered from drug trafficking, and thus relevant to the proof in this case by tending to establish that Bond's statements that he never received steroids from Anderson are false." Opp. at 16. Thus the proposed chain of relevancy is (a) Anderson has a large amount of cash; (b) Anderson is therefore a drug dealer; ergo, (c) Bonds obtained drugs from Anderson.

If the government ultimately rested its claim on this inferential chain, its argument would founder on the bar against use of character evidence to prove conduct on a specific occasion: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404 (b); *United States v. Sampson* 980 F.2d 883, 887 (3rd Cir. 1992) ("If the government offers prior offense evidence, it must clearly articulate how that evidence fits into a chain of logical inferences, no link of which can be the inference that because the defendant committed . . . offenses before, he therefore is more likely to have committed this one"). Were Anderson on trial for distributing illegal substances to Mr. Bonds, the government might well be barred from proving Anderson's guilt by establishing through the act of holding a large amount of cash that Anderson had the character of a drug dealer, and therefore must have sold drugs to Mr. Bonds. In any case, it is simply nonsense to assert that the government can attempt to prove *Mr. Bonds* received drugs from Anderson by the introduction of evidence concerning *Anderson's* character as proven by *Anderson's* prior bad acts. There is no case law that would permit such a tactic.

But the government then changes course when it states that it intends to proffer evidence that the cash held by Anderson was *not* the proceeds of drug dealing: to wit, "the government's evidence will include testimony from Stan Conte that Bonds asked Anderson to hold the cash, and that the cash was for Bond's mistresses." Opp. at 16. Here, the government's position is that the cash is admissible to prove Anderson's character not as a drug dealer, but as an *entremetteur* for the defendant's purported *liasons secretes*. Aside from the undoubted hearsay problems with Conte's testimony, what conceivable rationale can there can be for the admission of such

evidence? This trial will provide fodder enough for the tabloids; gossip from the witness stand about paramours would besmirch the dignity of this Court.

6. Documents and Testimony Associated with Other Athletes

The government initially sought to call other athletes to testify that they had received performance enhancing drugs from Anderson, and had maintained calendars as to their use similar to the calendars the government claims Anderson maintained for Mr. Bonds. Having excluded the latter calendars, this Court excluded the calendars of the other athletes as well. February 19th order, at 13-14.

The government now moves to reverse the Court's prior ruling as to the calendars, and to also permit the introduction of testimony of the other athletes and related documents. (Exhibits 4, 5, 12, 15, to 21, 31, 34, 37, and 39 to 41). The government claims that such testimony is admissible because "it has a tendency to prove the material fact of Bonds's knowledge that he was in fact receiving steroids from Balco." Opp. at 18. This evidence should be rejected. The government's proposed strategy "is one of guilt by association -- one of the most odious institutions of history. . . . Guilt under our system of government is personal." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 178 (1951) (Douglas, J., concurring).

The Ninth Circuit has long held that "[t]here can be no conviction for guilt by association." *United States v. Garcia*, 151 F.3d 1243, 1246 (9th Cir. 1998) (internal quotation marks omitted); *accord Kennedy v. Lockyer*, 379 F.3d 1041, 1056 (9th Cir. 2004); *United States v. Dickens*, 775 F.2d 1056, 1058 (9th Cir. 1985). Even raising such an inference constitutes prosecutorial misconduct. *Garcia*, 151 F.3d at 1245-46. In a variety of contexts, the Ninth Circuit has stated that it "strongly disapprove[s]" of evidence of guilt by association. *Virk v. INS*, 295 F.3d 1055, 1060 (9th Cir. 2002). Other circuits are no less staunch in their rejection of such evidence.[9]

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[9] *See, e.g.*, *United States v. McCall*, 553 F.3d 821, 826 (5th Cir. 2008); *United States v. Street*, 548 F.3d 618, 633 (8th Cir. 2008); *United States v. Ofray-Campos*, 534 F.3d 1, 23 (1st Cir. 2008); *United States v. Conrad*, 507 F.3d 424, 434 (6th Cir. 2007); *United States v.*

Evidence of guilt by association violates Rules 401, 403, and 404. As the Seventh Circuit has explained, evidence of guilt by association violates Rule 404 because it constitutes "group character evidence." *United States v. Doe*, 149 F.3d 634, 638 (7th Cir. 1998). Under Rule 404, it is impermissible for juries to conclude "that a particular defendant is guilty simply because the defendant shares some characteristics with a particular group." *Id*.

The government's proposed inference is one of group character and guilt by association. It seeks to prove Mr. Bonds's guilt by reference to the guilt of others in his profession. It seeks to argue to the jury that because other baseball players knowingly used steroids, Mr. Bonds also knowingly used steroids. Indeed, it is surprising how boldly the government makes this argument – it does not even attempt to disguise the nature of its theory of relevance. But that theory of relevance is plainly impermissible, having been rejected by both the Ninth Circuit and other courts for decades. The government should not be allowed to present any argument of guilt by association, and it should not be allowed to call the other athletes as witnesses at Mr. Bonds's trial.

7. Other Witnesses

The government's arguments for the admission of testimony by Agent Novitzky and other agents who conducted the searches "regarding their seizure of these documents at Balco and Anderson's residence to explain the background of their investigation, and the subsequent investigative steps taken after finding the documents, including the decision to subpoena Bonds to testify in the grand jury" (Opp. at 19) is dealt with above. The testimony proffered on the ground it provides "background" and "logical context" is not relevant to the issue of objective materiality, and in this case any probative value it might have is far outweighed by the fact that the government intends to use it for a prohibited purpose. That is made evident when the government states its intention to rely on the testimony concerning the excluded documentation to "show[]the connections between Bonds, Balco, and Anderson." Opp. at 19; *see also id*. at 20

Marshall, 173 F.3d 1312, 1317-18 (11th Cir. 1999); *Devaney v. Chester*, 813 F.2d 566, 568 (2d Cir. 1987).

(agent would testify "that he found documents linking Bonds to the steroid distributors at Balco...."). But there can be no linkage unless the jury were to conclude that the excluded documents concerned Mr. Bonds, which is precisely the use of the evidence that this Court has declared off limits. *Ryan v. Miller,* 303 F.3d at 253 ("Because the testimony is only relevant to the very purpose for which the jury cannot consider it, it is not admissible testimony under the background exception.").

As to James Valente, once the excluded documentary evidence is again ruled inadmissible, there is simply no relevance of any testimony that Valente might give concerning his tasks and observations at Balco.

8. The Proposed Redactions To The Indictment and the Grand Jury Transcript

The government appears to argue that it has a categorical right to admit the entire grand jury transcript. Opp. at 21-23. The argument is nonsense. Contrary to what the government suggests, the issue is not whether the questions asked and answers given were proper in the grand jury context, where, as the government notes, the Federal Rules of Evidence do not apply. *Id*. at 23. The question is what evidence is admissible at trial, where the Rules of Evidence most assuredly control the proceedings. The grand jury transcript is proffered evidence, and it cannot be admitted unless it is in compliance with the rules. In this case, the admission of certain portions of the transcript would violate Rule 403 because they would invite the jury to consider evidence specifically excluded by this Court's prior ruling.

The government relies on *United States v. Leon-Reyes*, 177 F.3d 816, 820 (9th Cir. 1999), for the proposition that it is allowed to prove materiality by submitting the entire transcript. In fact, *Leon-Reyes* thoroughly undermines the government's argument. The court in *Leon-Reyes* first recognized that there are several different types of evidence the government might use to prove materiality, including transcripts and grand juror testimony. *Id*. In *Leon-Reyes* itself, the government had admitted written summaries of the testimony rather than the transcripts themselves. The Ninth Circuit endorsed that procedure precisely because it recognized that in some cases, summaries might be less prejudicial than transcripts. *See id*. ("[T]he district court is

better able to monitor and exclude unduly prejudicial material from short summaries than the entire transcript.").

Other cases, both in the Ninth Circuit and elsewhere, have recognized that where transcripts contain prejudicial information, they should be redacted. *See Gebhard v. United States*, 422 F.2d 281, 283 (9th Cir. 1970) ("This does not mean that in every case where a witness is charged with perjury, the full transcript of his testimony is to go to the jury. The defendant should object to any portions of the transcript which he feels are prejudicial to his cause."); *see also United States v. Avery*, 760 F.2d 1219, 1223 (11th Cir. 1985) (reversing a conviction where the district court admitted prejudicial portions of a grand jury transcript); *United States v. Dipp*, 581 F.2d 1323, 1328 (9th Cir. 1978) ("This procedure reduces the danger of prejudice to the defendant which could be the result of placing the entire transcript before the jury."); *Harrell v. United States*, 220 F.2d 516, 520 (5th Cir. 1955) (stating that in perjury cases, the admission of prior testimony that reveals other crimes should be excluded).

In its Opposition, the government does not even address these arguments. Instead, it simply repeats the same fallacy that runs throughout its Opposition. It argues that the disputed portions are relevant, and therefore, that they are admissible. But relevance is not the sole criterion of admissibility. In order to be admissible, evidence must comply not only with Rule 401 but also with all of the other Rules of Evidence – including Rules 403, 404, and 802. Even assuming arguendo that the disputed portions are relevant – and would pass the "any tendency" test of Rule 401 – they are nonetheless inadmissible because they contain unfairly prejudicial information.[10] Those portions refer, in explicit detail, to the very evidence that this Court excluded in its February 19, 2009 order. To admit the entire transcript would thoroughly undermine that order.

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[10] The "discounted" probative value of this evidence is particularly low, moreover, because the government has so many other means of proof available. *See Old Chief v. United States*, 519 U.S. 172, 183 (1997) (stating that district courts conducting Rule 403 inquiries must examine alternate means of proof, and should exclude a proffered piece of evidence "if its discounted probative value [is] substantially outweighed by unfairly prejudicial risk").

Like any other piece of evidence with low probative value and a high potential for unfair prejudice, the disputed portions of the indictment and the grand jury transcript should be excluded from trial.

CONCLUSION

For the reasons set forth in defendant's opening motion and above, the government must be ordered to conform its proof at trial to the Court's previous order of February 19, 2010.

Dated: January 14, 2011

Respectfully submitted,

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